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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

11 SALVADOR CARVAJAL, an  
12 individual,

13 Plaintiff,

14 v.

15 H & M ENTERPRISES & LOGISTICS  
16 OF STATESVILLE, INC.; DAVID  
17 HAGER, an individual and dba H & M  
18 ENTERPRISES; DARRELL  
MILLSAPS, an individual and dba H &  
M ENTERPRISES; DAVID  
COVINGTON, an individual; and  
DOES 1 to 50, inclusive,

19 Defendants.

Case No. 2:13-CV-7853-CAS (JCGx)

**Judge: Hon. Christina A. Snyder**  
**Magistrate Judge: Hon. Jay C. Gandhi**

**DEFENDANTS' MOTION IN  
LIMINE #1 TO EXCLUDE  
CERTAIN EXPERT TESTIMONY  
OF KURT DOUGLAS WEISS**

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21  
22 Defendants H & M ENTERPRISES & LOGISTICS OF STATESVILLE, INC.,  
23 DAVID HAGER, DARRELL MILLSAPS, and DAVID COVINGTON  
24 ("defendants") hereby move this Court, *in limine*, for an Order excluding certain of  
25 the anticipated expert opinions of Kurt Douglas Weiss. The parties met and conferred  
26 regarding this issue on August 19, 2014 and again on September 5, 2014 and were  
27 unable to come to a resolution. Weiss' written report is enclosed herein as Exhibit A.  
28

1 **1. BACKGROUND FACTS FOR THIS MOTION.**

2 Kurt Douglas Weiss is a forensic engineer and collision reconstructionist  
3 requested by plaintiff counsel to perform an analysis and reconstruction of the  
4 accident. Weiss is not a visibility expert, has never been a commercial truck driver,  
5 and is not a human factors expert.

6 In his report, Weiss offers two possible scenarios. The first assumes that  
7 Carvajal was already stopped at the intersection when Covington approached and  
8 then stopped. The second assumes Covington was the first to arrive at the  
9 intersection and Carvajal arrived later.

10 In that first scenario, beginning at page 23 of Weiss' report, he assumes a  
11 highly biased chronology: Carvajal stops at the intersection, Covington stops and  
12 later activates his turn signal, and then starts the right turn. There is no evidence  
13 whatsoever to support an assumption where the turn signal was activated **after**  
14 coming to a stop at the intersection. Weiss contends that Covington never testified at  
15 his deposition that he activated his turn signal. But that question was never asked of  
16 Covington, making the assumption meaningless. Moreover, Carvajal admitted that  
17 he observed the right turn signal activated on the tractor.

18 In the second scenario, Weiss assumes that Covington arrived at the  
19 intersection before Carvajal and, while Covington was stopped, Carvajal pedaled his  
20 ice cream cart to a point to the right of Covington's tractor.

21 **2. STANDARD OF REVIEW**

22 Federal Rule of Evidence 702 requires that, to be admissible, expert testimony  
23 must (1) be based upon sufficient facts or data, (2) be the product of reliable  
24 principles and methods, and (3) reflect the reliable application of those principles and  
25 methods to the facts of the case. The Court must also act as a gatekeeper and assess  
26 the relevance and reliability of the expert testimony and "whether the reasoning and  
27 methodology underlying the testimony is scientifically valid and of whether that  
28 reasoning or methodology properly can be applied to the facts in issue." [*Daubert v.*

1 *Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 592.]

2 In *Kumho Tire Co., Ltd. V. Carmichael*, (1999) 526 U.S. 137, the Court  
3 confirmed that the gate-keeping task applied not only to testimony based on  
4 “scientific” knowledge, but also to testimony involving “technical” and other  
5 specialized knowledge. The Court commented that the purpose of gate-keeping is to  
6 “make certain that an expert employs in the courtroom the same level of intellectual  
7 rigor that characterizes the practice of an expert in the relevant field.” *Id* at 152.

8 **3. AN OPINION ABOUT ABILITY TO SEE IS INADMISSABLE.**

9 Weiss opines: “[i]f Carvajal was moving along side the trailer while  
10 Covington continually checked his mirrors for more than a minute’s time, then  
11 Covington would have detected to Carvajal’s presence using at least one, if not more  
12 of these side rearview mirrors. And, in passing the truck, Carvajal would have been  
13 visible through the elliptical-shaped window in the right front window.” [Report,  
14 page 24]

15 First, Weiss’ background is not in evaluating visibility and he has no special  
16 knowledge of tractor-trailers or experience in commercial truck driving. His opinion  
17 as to Mr. Covington’s ability to see and his visibility at the time of the accident is far  
18 outside the scope of his expertise.

19 Second, his opinion as to what Mr. Covington should have or would have seen  
20 at the time of the accident is not based on any scientific method – Weiss performed  
21 no tests or reenactments, and did not attempt to duplicate the accident. He cites no  
22 studies, specific measurements or data which show that he attempted to accurately  
23 calculate Mr. Covington’s ability to see Mr. Carvajal from the driver’s seat position.  
24 The opinion is also based on too many unexplained variables and dismisses contrary  
25 Covington testimony.

26 “Q. All right. When you looked in the mirror to your right on the passenger  
27 side you would have used both the, um, rectangular direct mirror and the  
convex mirror?

28 A. Yes.

Q. And during that period of time, the minute to a minute and a half that

1 you were stopped at the limit line, did you see anybody, anything that  
2 was in that space next to your trailer other than those parked cars?

3 A. No.

4 Q. Are you always consistently looking in your mirrors –

5 A. Yes. [*Deposition of David Christopher Covington*, 44:24-45:1-14]

6 Weiss' opinion is limited to a cursory visual inspection of the tractor's right  
7 side rearview mirror arrangement. Additionally, an opinion as to what a driver may  
8 or may not have seen calls for expertise in perception and visibility, an area for a  
9 human factor's expert, which Weiss is not.

10 In *Kumho* a product liability case involving an allegedly defective automobile  
11 tire, plaintiff's tire expert based his conclusions solely on a visual inspection of the  
12 tire. The Court excluded the testimony because, despite the expert's qualifications,  
13 "it initially doubted, and then found unreliable, the methodology employed by the  
14 expert in analyzing the data obtained in the visual inspection, and the scientific basis,  
15 if any, for such an analysis." [*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137,  
16 153.] Similarly, Weiss' opinion as to what Covington would have seen through his  
17 rearview mirror must be excluded because his methodology is equally unreliable.

#### 18 **4. AN OPINION ABOUT WARNING SIGNS IS INADMISSABLE.**

19 Weiss opines that there is a "hazard to the motoring public" as a result of the  
20 "off-tracking nature of the flatbed trailer." He opines the lack of any warning signs  
21 of this hazard on the trailer had a causal effect on this accident.

22 Weiss is not a human factors expert and has no experience or education in  
23 warning signs. As with other opinions, there is no support under case law or  
24 F.R.Evid. 702 to allow his testimony on that subject.

#### 25 **5. AN OPINION ON COMPLIANCE WITH LAWS IS INADMISSABLE.**

26 Weiss opines that under either scenario Carvajal did not violate any state or  
27 City of Long Beach law in the operation of his ice cream cart. He offers opinions on  
28 Carvajal's conduct as it applies to two Vehicle Code sections, despite having no  
education or experience in that field. [Report, p. 23] Weiss comes to an entirely



1 opposite conclusion than that of the investigating officer. Officer Sutton testified  
2 that if he had seen the conduct by Carvajal, he would have cited or ticketed Carvajal.

3 **5. AN OPINION ON SAFE TRUCK OPERATION IS INADMISSABLE.**

4 Weiss opines at page 33 of his report: "...if Carvajal had first arrived at the  
5 southwest corner, the Covington was remiss in the safe operation of his truck..."

6 Weiss does not have the "scientific, technical, or other specialized knowledge"  
7 required by Fed.R.Evid. 702 to opine on safe operation of a commercial vehicle.

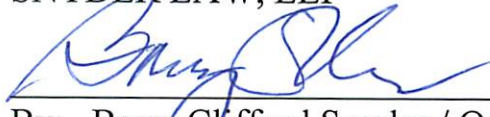
8 Under the *Daubert* progeny of cases, his testimony in that regard must be precluded.

9 **6. CONCLUSION**

10 Many of the anticipate opinions of Kurt Douglas Weiss are inadmissible. He  
11 should not be allowed to testify about what a commercial driver should have seen in  
12 his mirror, violation of laws, or safe tractor-trailer operation. Not only is his  
13 methodology unreliable, his education and expertise are faulty and he relies on  
14 considerable speculation to support those opinions.

15  
16 Dated: September 5, 2014

SNYDER LAW, LLP



17  
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**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed by the firm of Snyder Law, LLP, in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is 420 S. Fairview Avenue, Suite 102, Santa Barbara, California 93117.

On September 5, 2014, I served the foregoing document described as **DEFENDANTS' MOTION IN LIMINE #1 TO EXCLUDE CERTAIN EXPERT TESTIMONY OF KURT DOUGLAS WEISS** on all parties of record in this action as follows:

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I hereby certify that on September 5, 2014, I electronically transmitted the attached document to the clerk's office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the foregoing CM/ECF registrant.

/s/ Heidi J. Scranton  
Heidi J. Scranton